

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

v.

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
NATIVE WHOLESALE SUPPLY COMPANY, INC.,

Defendants.

**DECISION
and
ORDER**

14-CV-910A(F)

APPEARANCES:

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In this action seeking damages and injunctive relief alleging violations of federal and state law based on Defendants' failure to prepay excise taxes on cigarettes

manufactured, imported into and resold in New York State by Defendants, Plaintiff and Defendants, by papers filed June 8, 2020, move for a protective order pursuant to Fed.R.Civ.P. 26(c). (Dkt. 191) (“Defendants’ motion”), (Dkt. 192) (“Plaintiff’s motion”).

The parties’ protective orders (“PPOs”) are nearly identical except that Plaintiff’s PPO permits disclosure of confidential information obtained in discovery, as defined in the PPO, to “Any law enforcement, government or other regulatory agency,” Plaintiff’s PPO ¶ 5g, on condition that such proposed recipient agree to be bound by the Order with respect to maintaining the confidential status of the Defendants’ information, *i.e.*, documents or other material obtained by Plaintiff. Plaintiff’s PPO, Dkt. 192-2 ¶ 6. Significantly, Plaintiff’s PPO does not limit use of the confidential information by such agency recipients solely in connection with the instant action, unlike the restriction placed upon other recipients such as the court, deponents and experts. Dkt. 192-2 ¶ 4. In contrast, Defendants’ PPO provides for no such ‘carve-out’ permitting Defendants’ confidential information to be provided to such other governmental agencies. See Dkt. 191 ¶¶ 4, 5 a. – g.

Under Fed.R.Civ.P. 26(c), the court may grant relief from discovery in a civil action for good cause if such discovery protects a party from “annoyance, embarrassment, oppression, or undue burden.” (“Rule 26(c)(1)”). The party seeking relief carries the burden to establish the requisite good cause. See *Ceglia v. Zuckerberg*, 2012 U.S. Dist. LEXIS 204440, at * 8-9 (W.D.N.Y. Oct. 17, 2012) (citing *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 (2d Cir. 2004)). The Rule also allows for “substantial latitude” in granting relief. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). In the absence of a confidentiality agreement or protective

order restricting the scope of a recipient's disposition of information produced in response to a discovery request, a recipient is free to provide such information to non-parties. See *Sampel v. Livingston Cty*, 2019 WL 6695916, at *3 (W.D.N.Y. Dec. 9, 2019) ("Nevertheless, parties are free to disseminate discovery materials that are not placed under a protective order as they see fit.") (citing *Schiller v. City of New York*, 2007 WL 136149, at *2 (S.D.N.Y. Jan. 19, 2007)). See also *Jepson, Inc. v. Makita Electric Works, Limited*, 30 F.3d 854, 858 (7th Cir. 1994) ("Absent a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit.") (citing *Oklahoma Hosp. Ass'n v. Oklahoma Pub. Co.*, 748 F.2d 1421, 1424 (10th Cir.1984), *cert. denied*, 473 U.S. 905 (1985)). The purpose of Rule 26(c) protective orders is to prevent abuses of the otherwise open federal discovery process. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) ("[W]e have no question as to the court's jurisdiction to [enter a protective order pursuant to Rule 26(c)] under the inherent equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices.") (internal quotation marks and citation omitted); 10A FED. PROC. L. ED. § 26:260 (citing caselaw). Good cause for a Rule 26(c) protective order exists when the requesting party "'shows that disclosure will result in a clearly defined specific and serious injury.'" *Pitsiladi v. Guerrero*, 2008 WL 5454234, at *3 (S.D.N.Y. Dec. 30, 2008) (quoting *In re Terrorist Attacks on September 11, 2011*, 454 F.Supp.2d 220, 222 (S.D.N.Y. 2006) (quoting *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005)) (underlining added).

Here, Defendants' objections to Plaintiff's 'carve-out' and assertion of good cause for deletion of Plaintiff's request in Plaintiff's PPO to permit dissemination to sister

agencies turn on Defendants' asserted "wish to maintain the current balance between the existing instruments that regulators and law enforcement agencies possess and Defendants' entitlement to due process." Dkt. 191 at 4. However, the court fails to see how such rhetorical assertions equate to any "clearly defined, specific and serious injury," *Pitsiladi*, 2008 WL 5454234, at *2, that Plaintiff's putative dissemination, if any, could conceivably inflict on Defendants sufficient actual harm to constitute good cause for Defendants' proposed limitation. On the other hand, courts within this Circuit have recognized "[t]hat information obtained in discovery might reveal other wrongdoing for which [defendant] could be liable does not constitute the good cause required by Rule 26(c)," *EEOC v. United Parcel Service, Inc. ("UPS")*, 2018 U.S. Dist. LEXIS 37646, at *13 (E.D.N.Y. Mar. 5, 2018) (rejecting defendant's assertion that plaintiff's use of discovery information obtained by plaintiff from defendant should be limited to instant litigation only), and that sharing of information obtained during a civil investigation by an agency with the federal prosecutor was not prohibited. *See United States v. Fields*, 592 F.2d 638, 644-46 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979) (SEC communications of evidence obtained by agency in course of civil investigation to U.S. Attorney did not warrant dismissal of subsequent indictment). In the instant case, Plaintiff seeks to prohibit further violations of federal and state law with respect to Defendants' alleged continued importation of untaxed cigarettes thereby contributing to the well-documented public health hazard associated with excessive consumption, purchased free of applicable excise taxes, of such cigarettes and related compensatory damages for Defendants' past violations. That other agencies may have a valid interest in pursuing similar actions against Defendants and benefit from any sharing of

Defendants' confidential information by Plaintiff does not represent abuse of the discovery process and can be readily justified as in the public interest. Such motives attributable to Plaintiff can therefore hardly be characterized as a form of discovery abuse warranting Rule 26(c) relief.

Based on its review of the parties' respective submissions, the court therefore finds Defendants have failed to demonstrate good cause to delete paragraphs 4 and 5g as included in Plaintiff's PPO. Accordingly, Defendants' motion for a protective order without such provision should be DENIED; Plaintiff's PPO including such provisions should be GRANTED.

As to the court's inquiry concerning the need to communicate with this District's United States Attorney regarding Defendants' involvement in importing and resale of untaxed cigarettes, the court notes that its findings are contained within the Report and Recommendation (Dkt. 160) pending before Judge Arcara. As such, in the absence of Judge Arcara's determination of this issue based on the R&R, it would be premature to provide it to the U.S. Attorney at this time. Moreover, Defendants represent that senior officials of that office have been apprised about this case. See Dkt. 191 at 9. Accordingly, the court will defer further action in regard to this subject matter.

CONCLUSION

Plaintiff's motion (Dkt. 192) for a protective order is GRANTED; Defendants' motion (Dkt. 191) is DENIED. Plaintiff shall promptly submit a protective order in a form consistent with the foregoing for the court's signature.

SO ORDERED.

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

Dates: July 15th, 2020
Buffalo, New York